

COMMONWEALTH OF KENTUCKY



**ETHICS COMMISSION INVESTIGATIONS:
BEST PRACTICES**

GOVERNOR'S EEO CONFERENCE

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STATUTORY PROCESS: FROM INVESTIGATION TO THE COURTS

A. The Complaint or Information:

The Executive Branch Ethics Commission must investigate an alleged violation of KRS Chapter 11A upon receiving a complaint signed under penalty of perjury. The Ethics Commission may also investigate an alleged violation upon its own motion. The Ethics Commission considers information received by the Ethics Commission staff in person, by telephone, by letter, or through the media. Commission staff will take complaints from anonymous complainants, if the alleged conduct is specifically defined. If the information Commission staff receives indicates that a public servant may have violated the Ethics Code, the Ethics Commission will determine whether to initiate a preliminary investigation upon its own motion at its next regularly scheduled meeting.

The complaint, whether under penalty of perjury, informal, or anonymous, remains confidential. All records relating to the Ethics Commission's investigations, unless used as part of an administrative hearing, remain confidential. See 97-ORD-70, 02-ORD-44, 07-ORD-201, 07-ORD-202.

Source: KRS 11A.080(1) and 9 KAR 1:015.

B. The Preliminary Investigation:

Within ten days of the initiation of the preliminary investigation, the Ethics Commission must forward to the alleged violator a copy of the sworn complaint (if applicable) or, if there is no sworn complaint, a general statement of the law violated. Thus, the Ethics Commission will notify a public servant by certified letter if he or she is under investigation.

Unless an alleged violator publicly discloses the existence of the preliminary investigation, the Ethics Commission is required to keep confidential the fact of the preliminary investigation. This confidentiality remains until the Ethics Commission determines probable cause of a violation and initiates an administrative proceeding to determine whether there has been a violation. However, the Ethics Commission may inform a referring state agency of the status of, or any action taken on, an investigative matter referred to the Ethics Commission by the agency. It may also, for investigative purposes, share evidence, at its discretion, with the Auditor of Public Accounts and the Personnel Board, or any other agency with jurisdiction to review, audit, or investigate the alleged offense, evidence which may be used by those agencies for investigative purposes. These entities are covered by the confidentiality requirement of KRS 11A.080 when working with the Commission on a preliminary investigation. 94-ORD-81.

The Ethics Commission has the power to subpoena witnesses and evidence, as well as use the facilities of other agencies in carrying out its investigations. The Ethics Commission views its investigations as fact-finding missions. The Ethics Commission does not desire to bring charges without sufficient evidence. If the Ethics Commission determines that evidence is not sufficient to show probable cause of a violation during the preliminary investigation, the public servant is

confidentially informed that the investigation is terminated and such notification remains confidential. This confidentiality is designed to protect the reputation of an employee who is falsely accused of a violation or against whom there is insufficient evidence to warrant further action.

Source: KRS 11A.080(2) and (3), 11A.070, and 11A.090.

C. Common Issues Related to Conducting Ethics Commission Investigations:

➤ **Uncooperative Witnesses:**

Public servants, by nature of their positions, have a responsibility to cooperate with Ethics Commission investigations. If a public servant who is a possible witness refuses to participate, the Ethics Commission may refer the insubordinate employee to the agency management for possible personnel action. Nevertheless, it is the practice of the Ethics Commission to issue a subpoena pursuant to KRS 11A.090 and give the errant public servant/witness an opportunity to answer the subpoena before referring the employee to his or her agency for personnel action. The subpoena may be enforced in Franklin Circuit Court.

➤ **Agency Counsel Cooperation:**

When a public servant violates the Ethics Code, such conduct is the “personal behavior” of the individual and is outside of his or her duties and responsibilities as a public official. *Executive Branch Ethics Commission v. Stephens*, Ky., 92 S.W.3d 69, 73-74 (2002). A public servant who violates the Ethics Code, and does so resulting from his or her personal behavior, cannot be defended or represented by his or her own agency or the staff attorneys or legal counsel of that agency before the Ethics Commission. SCR 3.130(1.7) would prevent staff counsel from representing the public servant for the alleged violations of the Ethics Code before the Ethics Commission because the agency counsel would have a conflict of interest inherent to his or her duties representing the public agency and his or her responsibilities as a public servant.

The Rules of Professional Conduct relating to confidentiality do not prohibit agency counsel from cooperating with an investigation of the Ethics Commission into alleged conduct in violation of the Ethics Code because the alleged violator’s conduct is personal in nature and not protected by the immunities of his or her official office. *See* SCR 3.130 (1.6) Confidentiality of Information. Furthermore, agency counsel, as a public servant, would have a responsibility to report such conduct to the Ethics Commission. *See Advisory Opinion 13-02*. Finally, if the conduct of agency personnel, i.e. an agency official, is in violation of KRS 11A.040 and could result in criminal prosecution, agency counsel would have a responsibility to the Commonwealth to report and prevent such activity or could otherwise be considered as complicit. Any assistance provided by an Executive Branch attorney to someone whose conduct violates the Ethics Code could be found by the Ethics Commission to be in violation of the Ethics Code as well pursuant to KRS 11A.020.

Finally, agency counsel may be called to serve as a witness in any matter investigated by the Ethics Commission that involves an agency official to whom the agency attorney may have served as counsel. Thus, SCR 3.130 (3.7). Lawyer as Witness, would prohibit agency counsel from acting as an advocate for that agency official.

➤ **Whistleblowers:**

The “Whistleblower Act” codified at KRS 61.102 further protects public servants from reprisal for disclosing alleged violations of the law to the Ethics Commission. KRS 61.102 provides in pertinent part:

- (1) No employer shall subject to reprisal, or directly or indirectly use, or threaten to use, any official authority or influence, in any manner whatsoever, which tends to discourage, restrain, depress, dissuade, deter, prevent, interfere with, coerce, or discriminate against any employee who in good faith reports, discloses, divulges, or otherwise brings to the attention of the . . . the Executive Branch Ethics Commission . . . any facts or information relative to an actual or suspected violation of any law, statute, executive order, administrative regulation, mandate, rule, or ordinance of the United States, the Commonwealth of Kentucky, or any of its political subdivisions, or any facts or information relative to actual or suspected mismanagement, waste, fraud, abuse of authority, or a substantial and specific danger to public health or safety. No employer shall require any employee to give notice prior to making such a report, disclosure, or divulgence.
- (2) No employer shall subject to reprisal or discriminate against, or use any official authority or influence to cause reprisal or discrimination by others against, any person who supports, aids, or substantiates any employee who makes public any wrongdoing set forth in subsection (1) of this section.

Agency management may have a responsibility to protect employees covered by this Act from reprisals from the agency. Any employee who makes a complaint to the Ethics Commission, or is requested to participate in an investigation as a witness by the Ethics Commission, could be protected by the Whistleblower Act.

D. The Confidential Reprimand:

The Ethics Commission may find probable cause of a violation during a preliminary investigation, but find mitigating circumstances, such as lack of financial gain to the employee, lack of loss to the state, and lack of impact on public confidence. In such situations, the Ethics Commission may confidentially reprimand the alleged violator rather than initiate an administrative proceeding. A confidential reprimand is merely a letter from the Ethics Commission sent to the public servant by certified mail. A copy is also sent to the appointing authority with instructions that the letter remain confidential.

Source: KRS 11A.080(4)(a).

E. Charges of the Commission:

If the Ethics Commission finds probable cause that a public servant may have violated the Ethics Code, and no mitigating factors exist that would justify a confidential reprimand, the Ethics Commission will vote to issue charges against the violator. These charges come in the form of a document called the Initiating Order. This is the first public document in the Ethics

Commission's record. This document begins the administrative proceedings process. The Ethics Commission's charges are civil in nature, but can lead to criminal prosecution.

After charging an alleged violator with a violation of the Ethics Code, the Ethics Commission must prove by clear and convincing evidence during an administrative hearing that the public servant has actually violated the Ethics Code. This is a high standard and requires the Ethics Commission develops good, solid evidence during its investigations to bring charges against a violator.

The Ethics Commission's administrative hearings follow the KRS Chapter 13B process. During the administrative hearing, the alleged violator has due process rights to be represented by counsel, call witnesses, introduce exhibits, and cross examine witnesses. The Ethics Commission typically uses hearing officers from the Attorney General's Administrative Hearings Branch to oversee the conduct of its hearings. The Ethics Commission's General Counsel serves as the "prosecutor" of these actions. The Hearing Officer will hear all evidence and issue a recommended order to the Ethics Commission. A final determination whether a violation occurred is ultimately made by the Ethics Commission. A public servant may appeal a final order to the Franklin Circuit Court for judicial review and appeal these decisions all the way to the Supreme Court.

The Ethics Commission will settle matters with an individual if the individual will admit to the conduct and pay a reduced penalty. Penalties collected by the Ethics Commission are devoted to funding future administrative hearings.

Source: KRS 11A.080(4)(b), KRS 11A.100(1), (2), and (3).

F. Penalties

The Ethics Commission, upon clear and convincing proof of a violation of the Ethics Code, may:

- Issue a cease and desist order;
- Require a public servant to file a report, statement, or other information;
- Issue a written, public reprimand which will be forwarded to the public servant's appointing authority;
- Recommend to the appointing authority that the public servant be removed from office or his or her position; and
- Order the public servant to pay a civil penalty of not more than **\$5,000** for **each** violation.

In addition:

- ✓ If the violation has substantially influenced the action taken by any state agency in any particular matter, such shall be grounds for voiding, rescinding, or canceling the action on such terms as the interest of the state and innocent third persons require.

- ✓ The Ethics Commission **shall** refer to the Attorney General all evidence of violations of KRS 11A.040 for prosecution – violations are Class D felonies punishable by one to five years in jail and additional fines.
- ✓ An employee who fails to file with the Ethics Commission his statement of financial disclosure by the due date will have his salary withheld until the statement is filed.

Source: KRS 11A.100(3), (4), and (5), and KRS 11A.990.

G. When an attorney violates the Ethics Code

Executive Branch attorneys who violate the Ethics Code are referred to the Kentucky Bar Association's Bar Counsel for a determination of whether the conduct also violates the Rules of Professional Responsibility:

SCR 3.130(8.3) Reporting professional misconduct

- (a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the Association's Bar Counsel.
- (b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall report such violation to the Judicial Conduct Commission.
- (c) A lawyer is not required to report information that is protected by Rule 1.6 or by other law. Further, a lawyer or a judge does not have a duty to report or disclose information that is received in the course of participating in the Kentucky Lawyer Assistance Program or Ethics Hotline.
- (d) A lawyer acting in good faith in the discharge of the lawyer's professional responsibilities required by paragraphs (a) and (b) or when making a voluntary report of other misconduct shall be immune from any action, civil or criminal, and any disciplinary proceeding before the Bar as a result of said report, except for conduct prohibited by Rule 3.4(f).
- (e) As provided in SCR 3.435, a lawyer who is disciplined as a result of a lawyer disciplinary action brought before any authority other than the Association shall report that fact to Bar Counsel.
- (f) As provided in SCR 3.166(2), a lawyer prosecuting a case against any member of the Association to a plea of guilty, conviction by judge or jury or entry of judgment, should immediately notify Bar Counsel of such event.

SCR 3.130(8.4) Misconduct

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

- (d) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or
- (e) knowingly assist a judge or judicial officer in conduct that is a violation of applicable Rules of Judicial Conduct or other law.

H. Statute Of Limitations

For civil penalties, the Commission does NOT have a statute of limitations, and can review conduct, no matter when it occurred; however, the older the evidence, the shorter the memories, the harder a matter is to prove. KRS 11A.990 follows 4-year statute of limitations for felony convictions.